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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of Cink et al.

Art Unit 3643

Serial No. 10/805,802

Filed March 22, 2004

Confirmation No. 9954

For PEST CONTROL DEVICE AND METHOD

Examiner Kurt C. Rowan

October 20, 2004

**ELECTION AND PRELIMINARY AMENDMENT A**

TO THE COMMISSIONER FOR PATENTS,

SIR:

**Election and Traverse**

Applicants provisionally elect Group III directed to claims 15-23.

Applicants respectfully traverse the restriction of claims 1-23 into Groups I, II, and III.

**Groups I and II**

Applicants disagree with the Office's position and assert that the process for using the product as claimed cannot be practiced with another materially different product. In particular, the Office suggests that the methods of claims 10-14 can be practiced with a replaceable container having a perforate sidewall, rather than the claimed imperforate sidewall; Applicants strongly disagree.

According to M.P.E.P. § 806.05(h), "[i]f the applicant either proves or provides a convincing argument that the alternative use suggested by the examiner cannot be accomplished, the burden is on the examiner to support a viable alternative use or withdraw the requirement." Here, the alternative use of a replaceable container having a perforate sidewall "cannot be

accomplished." The imperforate sidewall of the replaceable container is a design feature that greatly enhances the performance of the replaceable container. Termites foraging through an upper portion of the soil contacting the imperforate sidewalls are directed downward and into contact with the aggregation base. The imperforate sidewalls lead the termites from the replaceable container to the aggregation base, thereby initially establishing a strong termite colony association with the aggregation base, not the replaceable container. This allows for the removal of the replaceable container with little to no disturbance of the termites within the aggregation base. If a replaceable container with perforate sidewalls were used, termites could establish a connection with the replaceable container first, bypassing the aggregation base completely, such that removing the replaceable container for routine inspection or replacement would lose direct termite association with the replaceable container, thereby leading to increased abandonment. A replaceable container with perforate sidewalls would greatly diminish the effectiveness of the replaceable container, thereby limiting the ability of the container to "be removed from the apparatus without substantially disturbing the aggregation base", as is required by claim 1. As such, Applicants submit that the alternative use suggested by the Office cannot be accomplished and the restriction of Groups I and II should be withdrawn.

**Groups I and III**

Applicants disagree with the Office's position and assert that it is not reasonable to separately use the subcombinations of Groups I and III. In particular, the Office suggests that the replaceable container has separate utility for monitoring and destroying termites without the aggregation base; Applicants strongly disagree.

According to M.P.E.P. § 806.05(d), "[i]f applicant proves or provides an argument, supported by facts, that the other use, suggested by the examiner, cannot be accomplished or is not reasonable, the burden is on the examiner to document a viable alternative use or withdraw the requirement." Here, the separate utility of the replaceable container for monitoring and destroying termites without the aggregation base "is not reasonable." The combination of the aggregation base and the replaceable container is one of the unique features and strengths of the present invention. The replaceable container can monitor termite activity and, when replaced with a bait cartridge, control termites, but it is the relationship of the aggregation base to the replaceable container that is important. The aggregation base serves as the supply chain for termite activity to the replaceable container. This connection is one that serves to re-establish termite activity within the replaceable container after its removal during routine inspection or replacement. Specifically, as termites traverse between the aggregation base and the replaceable container, strong connections between the two form due to pheromone trails established by the termites. During routine inspection or replacement of the replaceable container, these connections are only terminated in the portion of the apparatus occupied by the replaceable container, while the connections are maintained with respect to the aggregation base. Thus, the aggregation base may continue to serve as the direct colony connection to the replaceable container. Termites will readily re-establish their connection with a new replaceable container after replacement due to the strong termite connection to the aggregation base.

Utilizing the replaceable container alone, with no aggregation base, is not a reasonable use, because there is no ability to monitor termite activity and alter the contents of the replaceable container without disturbing the termites and risking

abandonment. As such, Applicants submit that the alternative use suggested by the Office is not reasonable and that the restriction of Groups I and III should be withdrawn.

**Groups III and II**

Applicants disagree with the Office's position and assert that the process for using the product as claimed cannot be practiced with another materially different product. In particular, the Office suggests that the methods of claims 10-14 can be practiced with an aggregation base not having a channel, rather than the claimed aggregation base with at least one channel; Applicants strongly disagree.

According to M.P.E.P. § 806.05(h), "[i]f the applicant either proves or provides a convincing argument that the alternative use suggested by the examiner cannot be accomplished, the burden is on the examiner to support a viable alternative use or withdraw the requirement." Here, the alternative use of an aggregation base not having a channel "cannot be accomplished." The channel of the aggregation base is a design feature that greatly enhances the performance of the aggregation base. The aggregation base has at least one void and at least one channel passing through the aggregation base leading to the void. The void encourages termite aggregation and establishment of a strong connection to the termite colony. The channel directs termites into the void, so that the termites utilize the void as an aggregation site. Without the channel, as suggested by the Office as an alternative use, termites are not drawn into the void and can simply feed or infest other portions of the outside of the base with no readily apparent indications of their feeding activity. In particular, without a channel, the likelihood of the termite finding the void is severely reduced. Without the channel leading termites to the void for an aggregation site, monitoring the activity of the termites within the aggregation

base is severely curtailed and often requires removal of the aggregation base. As discussed above, this disrupts termite activity within the aggregation base by severing direct tunnel access to termites, thereby significantly increasing abandonment. An aggregation base without at least one channel leading to the void would greatly diminish the effectiveness of the aggregation base, thereby limiting the ability of the replaceable container to "be removed from the apparatus and replaced without substantially disturbing the aggregation base", as is required by claim 15. As such, Applicants submit that the alternative use suggested by the Office cannot be accomplished and the restriction of Groups III and II should be withdrawn.

Respectfully submitted,



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